STATE OF MICHIGAN

IN THE SUPREME COURT

QUALITY PRODUCTS AND CONCEPTS COMPANY,

Plaintiff-Appellee,

-vs-

NAGEL PRECISION, INC.,

Defendant-Appellee.

_____/

Supreme Court Docket No. 119219

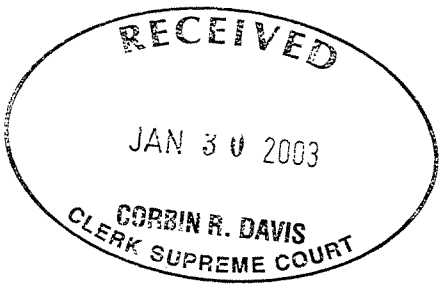
Prior Supreme Court Docket No. 116673

Court of Appeals Docket No. 207538

Lower Court No. 96-612160-CK

PLAINTIFF-APPELLEE'S RESPONSE BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED



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DATED: January 28, 2003

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QUESTIONS PRESENTED FOR REVIEW

A. Is ¶ 11 of the Written Contract Relevant or Applicable to the Circumstances of this Case?

Plaintiff-Appellee QPAC answers: "No."

Defendant-Appellant Nagel answers: "Yes."

The Court of Appeals has not addressed this issue.

B. Can a Trier of Fact Conclude that an Enforceable Modification/Waiver Took Place?

Plaintiff-Appellee QPAC answers: "Yes."

Defendant-Appellant Nagel answers: "No."

The Court of Appeals has answered: "Yes."

C. Should This Court Remand This Case to the Trial Court for Determination of Issues Relating to Contracts Implied in Fact or Law or Estoppel?

Plaintiff-Appellee QPAC answers: "Yes."

Defendant-Appellant Nagel answers: "No."

The Court of Appeals answered "Yes" as to waiver and contracts implied in law, but did not specifically address the implied in fact issue.

FACTS

The Court of Appeals, in its March 21, 2000 (410a-418a) Opinion (COA I), sufficiently recites facts, including the numerous writings from Plaintiff to Defendant concerning the sales in issue and other relevant circumstances. (411a-412a; 415a-416a and 418a.) *See* discussion, *infra* pages 19-20. These facts are essentially correct for purposes of responding to the Defendant-Appellant's (Defendant/Nagel) brief and upon which this Court may rely in its determination, except as may be supplemented by Plaintiff-Appellant (Plaintiff/QPAC) in the body of this brief.

SUMMARY OF ARGUMENT

QPAC generally agrees with the law cited in the COA I Opinion, however, the court should have permitted this case to go forward on all the alternatively pled basis, including implied in fact contract, as well as waiver and implied in law contract (*quasi* contract/unjust enrichment).

This Court's December 15, 2000 Order (MSC 12/15/00) remanded this case to the COA essentially holding that only waiver could be applicable and stating that an implied in law contract "...cannot be recognized where, as here, the express contract covers the subject sales by providing that no commissions would be paid for them." (458a: MSC Opinion 12/15/00.) With all due respect, this is absolutely wrong because it impermissibly makes a factual determination that is inconsistent with the Court's own finding that the sales are non-commissionable to the Plaintiff because they are excluded from the scope of the written contract as outside Plaintiff's territory.

Defendant cannot have its cake and eat it too.

Remember the reason Defendant says it would not pay the commissions is because the sales were outside the Territory. If so, by the very nature of Defendant's position, there can be an implied in fact or implied in law contract or waiver of the written contract's strict terms.

Since those sales are excluded from the written contract, they cannot be part of that express contract, except by waiver, which this Court and the Court of Appeals recognized and which is an issue for the trier of fact to decide. However, the Plaintiff could also rightfully assert and successfully prove that, under the facts, an implied in fact or law contract was created. Because these causes of action were also alternatively pled, under *H.J. Tucker & Associates, Inc. v Allied Chucker& Eng'g Co.,* 234 Mich App 550, 573; 585 NW2d 176 (1999); *lv den* 461 Mich App 949 (2000) and its genesis, they are for the jury to decide.

If Defendant is found to be estopped from denying a waiver, then the written contract applies with its limited commissions. Here, Defendant's contention that the sales Plaintiff claims commissions on were outside the written contract is fine with Plaintiff. Plaintiff's complaint (13a-19a) asserts this, and Plaintiff will argue that the commission formula would not necessarily apply under the facts here on the basis of an implied in fact or law setting and Plaintiff would be entitled to greater commissions then those provided for in the written contract. In conformity with the standard in the industry and/or the parties' prior arrangement, the commission would be 10% without limitation.

This approach permits the trier of fact to decide fact issues and, if appropriate, find for or against Plaintiff after all the evidence is put before it. This procedure has been

approved on repeated occasions, including *Tucker, supra;* MCR 2.111(A)(2), and there is no basis that would deny Plaintiff this opportunity under the facts here.

The written contract in question (21a-31a) had no provisions prohibiting Plaintiff from soliciting sales outside the written contract's territory. It in no manner addressed the subject sales, as was pointed out in the COA I Opinion. The Court of Appeals determined there were genuine issues of fact concerning waiver and contract implied in law and that despite there being, "...no evidence in the record that the parties ***expressly*** agreed orally or in writing to modify the written agreement[,]" (emphasis by the court) (413a: COA 3/21/00, p 4); it then went on to state that:

> [a]lthough an implied in law contract cannot be enforced while there is an express contract covering the same subject matter in force between the parties. *Scholz v Montgomery Ward & Co, Inc.* 437 Mich 93, 93; 468 NW2d 845 (1991), the express contract here is clearly confined to the parties' duties and obligations with respect to a particular territory.[8] The contract does not purport to set forth the duties and obligations of the parties with respect to the sales at issue. (415a-416a.)

Footnote 8 referenced above accurately paraphrases certain provisions of the written contract and reads as follows:

> The agreement recites that Nagler [sic Nagel], in need of the services of a representative in the territory, and QPAC, being willing and able to provide the services, agree that QPAC is appointed the authorized sales representative in the territory, and accepts the appointment subject to the terms and conditions of the contract. QPAC agrees to use its best efforts within the territory, and NAGEL agrees to pay as payment in full for QPAC's services *under the contract* certain commissions for orders procured and delivered within the territory. The agreement purports to provide the entire agreement of the parties *"relative to the subject matter hereof."* (Emphasis by the Court.) (418a.)

There is nothing in the written contract that expressly or impliedly prohibits Plaintiff from undertaking expanded representation for Defendant outside the territory. It merely:

(1) non-exclusively appoints Plaintiff to represent Defendant in a limited Territory, which is defined on Exhibit A and purports to exclude from the written contract the sales upon which Plaintiff claims commissions here; (21a, § 1 and 29a, § B); and

(2) says the contract contains "the entire agreement between the parties ***relative to the subject matter hereof.***" And, it further states that the "[a]greement cannot be modified in any way without the written consent of the parties." (Emphasis ours.) (29a, § 13(a) and (b).)

But, two things are known for sure with regard to the modification issue in this case. The first is that the applicable law has a long history, which has been repetitively upheld by this Court, establishing that despite such a provision, modifications can and often are made expressly or impliedly (including by course of conduct). That is the way businesses often operate. And, as a practical matter, to require anything else would bring commerce to a crippling crawl and would serve no legitimate economic or social purpose.

The second thing is the copious amount of written documents going from Plaintiff to the Defendant, which were acknowledged and not rebuffed by Defendant. These documents establish Plaintiff's pursuit of this business, which was outside the written contract, but not prohibited by it. Coupling those documents with the Defendant's written acceptance of Plaintiff's extra efforts outside the written contract in the form of Defendant's various written documents to the customers, consisting of quotations, acceptance of the customers purchase orders and similar writings, establishes that Defendant consented to the Plaintiff's involvement. These writings by the Defendant to

the customers, in tandem with Plaintiff's writings to the Defendant, could, in the eyes of a fact finder, constitute a sufficient written amendment modifying the written contract to satisfy ¶¶ 11 and 13(b). (29a.)

However, if this case proceeds on the basis of contract implied in fact or law (*quasi* contract) and the fact finder determines that an implied contract existed, then anything contained in the written contract, including ¶¶ 11 and 13, is irrelevant and moot. But, under any circumstance, for the reasons stated *infra*, ¶ 11 is of no effect in this case anyway.

Previously, the Court of Appeals, in its COA I ruling, held that a fact finder could find the existence of a basis for an implied in law (*quasi*) contract or a waiver of the terms of the written contract. The Court of Appeals' ruling of April 24, 2001 (459a-465a) (COA II) was hamstrung by this Court's remand (MSC 12/15/00) limiting a review to the waiver only issue. Once again, the Court of Appeals, in its COA II Opinion, held that under the circumstance, a fact finder could find a waiver of the terms of the written contract and remanded the case to the trial court.

On Defendant's second application for leave, this Court granted leave and specifically directed the parties to address ¶ 11 of the written contract. (MSC 10/30/02.) (512a.)

It is Plaintiff's position that this case should be remanded to the trial court for trial by jury on all of the alternative causes of action pled (e.g., implied in fact or law contract and waiver).

Under any scenario, Plaintiff is entitled to receive commissions for the sales involved.

DETAILED ARGUMENT

A. PARAGRAPH 11 OF THE WRITTEN CONTRACT IS NOT RELEVANT OR APPLICABLE TO THE CIRCUMSTANCES OF THIS CASE.

This Court ordered the parties to address the "anti-waiver" provision of ¶ 11 of the written contract. (MSC 10/30/00.) (512a.) While the waiver of the "written modification provision" of ¶ 13 had been the point of contention in the trial court and in the Court of Appeals on both occasions, the applicability of the ¶ 11 "anti-waiver" provision has never been previously addressed during the approximately 7 years of litigation:

- not by Defendant in its Brief in Support of its Motion for Summary Disposition (34a-119a),
- or in its Reply Brief to Plaintiff's Response to Defendant's Motion for Summary Disposition (193a-197a),
- not by the trial court in its Opinion and Order granting summary disposition (201a-204a);
- or in Defendant's Brief to the Court of Appeals (316a-409a);
- or in the Court of Appeals Opinion of March 21, 2000 (COA I);
- or in Defendant's first Application for Leave to this Honorable Court (419a-451a);
- or in its July 14, 2000 Motion for Peremptory Reversal (452a-457a);
- not by the Court of Appeals in its April 24, 2001 Opinion (COA II) (401a-418a, 459a-465a);
- or in Defendant's second Application for Leave (467a – 506a); and
- not in it's May 24, 2001 Motion for Peremptory reversal (507a-511a).

In fact, the Court of Appeals, in QPAC II, noted that it was assuming that this Court's reference in the remand order to the "anti-waiver" provision referred to the

provision of the agreement that stated it could not be modified without the parties written consent. (¶ 13(b).) (459a.)

This assumption was reasonable based on this Court's language in its Order (458a: MCS 12/15/00), which says:

> Such a contract cannot be recognized where, as here, the express contract covers the subject sales by providing that no commission would be paid for them. ***We REMAND...for reconsideration*** of the issues whether there exists a genuine fact dispute as to whether defendant's alleged silence in the fact of plaintiff's activity relative to the excluded machine tool suppliers constituted a waiver in light ***of the anti-waiver provision*** in the contract ***which purports to prevent modification of the written agreement."*** (Emphasis ours.) (458a.)

Modification of the written agreement is not prohibited. If it was,¶ 13(b) (29a), which specifically allows it, would not exist and, of course, the long standing law is to the effect that the parties are always free to modify their agreement orally, by course of conduct, in writing or otherwise.

This omission by the parties and the Court of Appeals to address ¶ 11was not inadvertent; it was because no one read ¶ 11 as having any relevance to the issues in this case. It is only now, after the second trip up to this Court, that the parties have been ordered (512a: MSC 10/30/02 Order) to brief this specific provision. The provision provides as follows:

> No delay, omission or failure of ***Nagel*** to exercise any right or power under this Agreement or to insist upon strict compliance by Representative of any obligation hereunder, and no custom or practice of the parties at variance with the terms and provision hereof shall constitute a waiver of ***Nagel's*** rights to demand exact compliance with the term hereof; nor shall the same affect or impair the rights of ***Nagel*** with respect to any subsequent ***default of the Representative*** of the same or different nature. (Emphasis ours.) (29a, ¶ 11.)

There are at least two reasons why the provision is irrelevant.

First, it is one-sided and only gives rights to Defendant. Therefore, it lacks mutuality, a necessary contractual element. *See Campbell v Michigan Judges Retirement Bd*, 378 Mich 169, 180; 143 NW2d 755 (1966). Mutuality of Obligation requires both parties to be bound or neither is bound. "[M]utuality is not present when one party is bound to perform, but not the other." *Reed v Citizens Ins Co of America*, 198 Mich App 443, 449; 499 NW2d 22 (1993); *lv den* 444 Mich 964 (1994). Therefore, it should be severed as is provided for in the contract. (29a, § 13(c).)

Second, and more importantly, the provision (¶ 11) has nothing to do with the issues here. All it states is that the Defendant, and only the Defendant, may (but not must) demand future exact compliance with the terms of the written contract (i.e., "under this Agreement;" "of any obligation hereunder;" "with the terms and provisions hereof;" etc.) where the Defendant had previously waived a ***default*** of the Plaintiff. Since the Plaintiff was never in default under the terms of the written agreement, ¶ 11 has no relevance here and neither do the cases cited by Defendants.

Further, in the case of *Formall, Inc v Community Nat'l Bank of Pontiac,* 138 Mich App 588; 360 NW2d 902 (1984), upon which Defendant relied, the Court of Appeals reversed the trial court's grant of summary disposition. In doing so, it cited to and adopted the procedure laid down by the court in *Westinghouse Credit Corp v Shelton*, 645 F2d 869, 873-74 (CA 10, 1981), which held:

> ***"....an 'anti-waiver' clause, like any other term in the contract, is itself subject to waiver or modification by course of performance and that whether such wavier or modification has occurred is a question for the fact finder.***" (Emphasis ours.) Westinghouse Credit Corp v Shelton, 645 F2d 869, 873-874 (CA 10, 1981). Formall, supra at 597.

The *Formall* court also noted that jurisdictions that followed *Westinghouse* have held that an "anti-waiver" clause is itself subject to estoppel given the correct set of facts and whether the correct set of facts is present, is a question of fact. *Formall, supra* at 601 citing *Smith General Finance Corp,* 243 Ga 500; 255 SE2d 14 (1979); *Van Bibber v Norris*, 404 NW2d 1365, 1373-74 (Ind App, 1980); *Woods v Monticello Development Co*, 656 P2d 1324, 1324 (Colo App, 1982); *National Livestock Credit Corp v Schultz,* 652 P2d 1243, 1247 (Okla App, 1982).

Not only was QPAC never in default under the terms of the written contract, but Boschler attempted to renegotiate it starting in early 1995, with the object of significantly reducing QPAC's opportunities by taking away lucrative customer accounts (territory). This was not because of any dissatisfaction with QPAC's services, but, as Boschler self-servingly testified, because QPAC's workload was too large to handle. (411a-412: COA 3/21/00.)

QPAC believes, as could a jury, that the attempted, unsuccessful renegotiation by Nagel, after being provided with QPAC's regularly submitted written documents through 1994 and into 1995 claiming commissions on the subject sales and then being fired on March 8, 1995, after QPAC was requesting a complete accounting of commissions due and to become due, was the real reason for Nagel's actions and a blatant attempt to evade the payment of justly due commissions.

B. A TRIER OF FACT CAN CONCLUDE THAT AN ENFORCEABLE MODIFICATION/WAIVER TOOK PLACE HERE.

This Court has repeatedly established the black letter law that a written contract may be modified or abrogated by a subsequent agreement.

> The written agreement, after it was signed by the defendant, could be modified and strict performance thereunder waived or abrogated by the parties, without violating the rule against the admission of the evidence to alter, vary or contradict a written agreement. The rule relates to an attack upon the writing itself, and has no reference to the right of the parties to change the method or manner of performance or waive the rights or remedies thereunder by parol. * * * If the parties considered it to their advantage to depart from strict performance of the agreement, that would constitute a sufficient consideration.
>
> ***A departure from stipulated performance can be predicated upon acts*** as well as upon an express agreement to that effect. (Emphasis ours.) *Jacob v Cummings,* 213 Mich 373, 378; 182 NW 115 (1921)

"This rule obtains even though the parties to the original contract stipulate therein that it is not to be changed except by agreement in writing....Such a provision in a contract does not prevent the parties thereto from dealing otherwise by mutual consent." *Morley Bros, Inc v FR Patterson Const Co.* 266 Mich 52, 55; 253 NE 213 (1934). *See also, Turner v Williams,* 311 Mich 563; 19 NW2d 100 (1945); *Nelson v Witte*, 347 Mich 411, 79 NW2d 90 (1956); 5A Michigan Civil Jurisprudence, Contract, § 267, p 363. ***"[O]n conflicting evidence it is for the jury to determine whether a contract was modified by subsequent agreement of the parties."*** (Emphasis ours.) 6A Michigan Law & Practice, Contracts, § 256, p 278. *See Rasch v National Steel Corp,* 22 Mich App 257, 260; 177 NW2d 428 (1970) where the court found a question of fact as to the issue of modification and reversed the trial court's order granting defendant summary disposition. *See also, Evans v F J Boutell Driveaway Co, Inc,* 48 Mich App 411, 421; 210 NW2d 489 (1973) where the court held that a plaintiff's silence from the time the modification agreement was entered into until the time the complaint seeking injunctive relief was filed supports defendant's theory that the parties modified their agreement.

Likewise, the law with regard to waiver is also well entrenched.

> But the contract cannot by its terms, and does not, banish their freedom to subsequently deal with each other relative to it and its subject-matter as they see fit either in modification of its terms or to abrogate it entirely. ***A written contract of this nature can no more prohibit otherwise valid oral agreements on the subject than could an oral agreement by like provisions bar the parties from entering into a subsequent written agreement.*** Where the subject-matter does not require the contract to be written, oral agreements are as effective as written ones. *West Haven Water Co. v. Redfield,* 58 Conn. 39 (18 Atl. 978); *Bartlett v Stanchfield*, 148 Mass. 394 (19 N. E. 549); 9 C.J. p. 788 *et seq.*, where abundant authority will be found supporting these principals in foot-notes to the discussions of the subject.
>
> The weight of evidence is persuasive of waiver, which is primarily an issue of fact. ***A waiver may be shown by proof of*** express language or agreement or inferably established by such declarations, ***acts and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance.*** (Emphasis ours.) *Strom-Johnson Const Co v Riverview Furniture Store,* 227 Mich 55, 67; 198 NW 714 (1924).

The Court of Appeals, in both COA I and COA II, cite to, rely on and quote from this Court's opinion in *Klas v Hardware & Furniture Co*, 202 Mich 334, 339-340; 168 NW 425 (1918):

> Regarding waiver, in *Klas v Hardware & Furniture Co*, 202 Mich 334; 168 NW 425 (1918), the Supreme Court addressed the question whether the defendant had expressly or impliedly waived a condition in the parties' written contract providing that written permission was required to do extra work, and whether waiver was a question for the jury:
>
> The law has been stated as follows:
>
> > "'Waiver is a matter of fact to be shown by the evidence. It may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; ***or it may be shown by a course of acts and conduct, and in some cases will be imposed therefrom. It may also be shown by so neglecting and failing to act as to induce a belief that there is an***

> ***intention or purpose to waive. Proof of express words is not necessary, but the waiver may be shown by circumstances or by a course of acts and conduct which amounts to an estoppel." 40*** Cyc. p 267.
>
> "Waiver is a mixed question of law and fact. It is the duty of the court to charge and define the law applicable to waiver, but ***it is the province of the jury to say whether the facts of the particular case constitute waiver as defined by the court.***'" 40 Cyc. p. 270.
>
> "A provision in the contract that all extra work shall be ordered by the architect in writing may be waived by the parties, the question whether there has been such a wavier usually being one of fact, depending on the facts and the circumstances of the particular case. ***Thus such waiver may be implied where the order and the extra work are known to the owner,*** or whether the extra work is orally ordered by the owner or called for by the agent in the plans and specifications; ***or the owner by his conduct may be estopped from setting up such provision as a defense.***" 9 Corpus Juris, p. 846 [Emphasis in original.]

See also, 17A Am Jur 2d, *supra,* § 656, stating in pertinent part:

> ....An implied waiver exists when there is an unexpressed intention to waive, which may be clearly inferred from the circumstances, ***or no such intention in fact to waive, but conduct which misleads one of the parties into a reasonable belief that a provision of the contract has been waived.*** (Emphasis in original.) (COA I, 414a and COA II 462a-463a.)

Notwithstanding this enunciated state of the law and facts, which gives rise to a question of fact as to waiver and estoppel and contrary to the COA I and COA II, Nagel appears to argue that it must have expressly orally modified and expressly waived the written modification requirement of the contract.

Yet, in its brief, Nagel attempts to use the world "oral" as the seminal requirement for there to be a modification. But in doing so it is defining that term to mean expressly spoken by it. However, that is not how it is meant to be interpreted in a case such as

this. There is no case that states the commitment must be made "orally" by the person to be charged, i.e., Nagel, including *Banwell v Risdon,* 258 Mich 274; 241 NW 796 (1932), cited by Defendant. *Banwell, supra,* does not even use the term "oral" it says "verbal."

Black's defines oral as "[u]ttered by the mouth or in words; spoken, not written." It defines "verbal" as "of or pertaining to words,..." Black's also defines the "verbal act doctrine" and states "[u]nder this doctrine, utterances accompanying some act or conduct to which it is desired to give legal effect are admissible where conduct to be characterized by words is material to issue and equivocal in its nature, and words accompany conduct and aid in giving it legal significance." Blacks Law Dictionary. Rev. 4th Ed. (1968), pp 1246; 1729-1730.

Contrary to Defendant's claim, there is no requirement that the modification here had to have been "orally" made by Nagel. And, Plaintiff verbalized its claim for commissions in its many writings to Defendant referenced *supra* and *infra*, to which Defendant made objection, written or oral.

Nagel also contends that "...neither the court below [Court of Appeals] nor either of the parties has located any Michigan case that has rejected *Barnwell* and held that a defendant's failure to object to activities of a plaintiff is enough to waive a written modification requirement." (Nagel's Brief, p 22.) This statement is both incorrect and not consistent with the facts in the instant case.

In *Cascade Elec Co v Rice*, 70 Mich App 420, 424-425; 245 NW2d 77 (1976), the court examined *Barnwell, supra,* and the rest of the law relating to waiver. There, the Court of Appeals ruled as follows:

> The parties are both agreed that requirements for written change orders are enforceable; *Banwell v Risdon*, 258 Mich 274; 241 NW

796 (1932). Both parties are also agreed that such a requirement may be waived by the person benefited by such provision; *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334; 168 NW 425 (1918). Relying upon *Banwell, supra,* defendant urges that the rule as to waiver is as follows:

> "It does, however, place upon plaintiff the burden of establishing by convincing evidence that changes charged for and not authorized in writing were in fact authorized by verbal agreement, *inclusive of full understanding of call for payment thereof."* 258 Mich at 278-279 (Emphasis added.)

Plaintiff cites *Klas v Pearce Hardware & Furniture Co,* 202 Mich 334; 168 NW 425 (1918), in which the following quotation is cited with approval:

> "'Waiver is a matter of fact to be shown by the evidence. It may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or it may be shown by a course of acts and conduct, and in some cases will be imposed therefrom. ***It may also be shown by so neglecting and failing to act as to induce a belief that there is an intention or purpose to waive. Proof of express words is not necessary, but the waiver may be shown by circumstances or by a course of acts and conduct which amounts to an estoppel.***' 40 Cyc. p 267.
>
> "Waiver is a mixed question of law and fact. It is the duty of the court to charge and define the law applicable to waiver, but ***it is the province of the jury to say whether the facts of the particular case constitute waiver as defined by the court.***' 40 Cyc. p. 270." (Emphasis ours.)

Plaintiff also cites *Jarosz v Caesar Realty, Inc,* 53 Mich App 402; 220 NW2d 191 (1974) and particularly the authorities cited at 405.

We agree with the plaintiff that the question of waiver is as he claims. *Banwell, supra,* is internally inconsistent in its language. It does contain the quotation cited by defendant, but also contains the following:

> "Many changes were made in the playhouse at the verbal request of Mrs. Risdon *without discussion of cost*, and *the following items are allowed."* 258 Mich at 276. (Emphasis added.)

> Thus, while the Court stated as one of the elements of a verbal waiver of a requirement of a writing that there be "full understanding of call for payment thereof," it appears that the result in that case is in fact more consistent with the language found in *Klas*, as reiterated in *Jarosz*. (Emphasis ours.) *Cascade, Id* at p 424-425.

It is important to note that in *Banwell* this Court did not specifically overrule the *stare decisis* enunciated in *Klas* or its progeny. *Banwell* did not even cite *Klas.* Further, no appellate court has overturned the law of *Klas.* To the contrary, it has been sustained in all instances where the facts support the stated law.

Reading *Banwell, supra,* it is obvious that the court there treated the matter as a specific issue, and its ruling is limited to the facts of that case. The same is true here.

Defendant's argument completely disregards the law with regard to estoppel, modification and waiver and it disregards the evidence that irrefutably established that Plaintiff verbalized and Nagel knew the specific basis for the commissions being charged by QPAC (per the detailed documents previously referenced), including written status reports sent to Nagel setting forth the commission percentage figure and the sum QPAC anticipated being paid on the orders in question. Defendant's allegation that Boschler told Barton QPAC would not be paid for these sales is vigorously disputed by Barton and raises a fact issue.

A review of the cases cited by Defendant shows that the vast majority were tried cases and those where a summary disposition was sustained have vastly different facts. Further, Defendant's reliance on *Cook v Little Caesar Enterprises, Inc,* 972 F Supp 400 (E D Mich 1997) is misplaced because it is fact specific and lacks estoppel issues and

the alternative basis pled by Plaintiff here, consisting of implied in fact or law contract and the specific activities, which give rise to a waiver of the written modification requirement. It also found the existence of fact issues, prohibiting a summary judgment on matters found to be ambiguous with the franchise agreement relating to hours of operation.

C. THIS COURT SHOULD REMAND THIS CASE TO THE TRIAL COURT FOR DETERMINATION OF ISSUES RELATING TO CONTRACTS IMPLIED IN FACT OR LAW OR ESTOPPEL.

This Court has also held that a party's acts can establish an implied in fact contract.

> A contract is implied where the intention as to it is not manifested by direct or explicit words between the parties, but it is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, ***or other pertinent circumstances attending the transaction.*** (Emphasis ours.) *Miller v Stevens,* 224 Mich 626, 632; 195 NW 481 (1923).

An implied contract "arises when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor." *In re Pierson's Estate*, 282 Mich 411, 415; 276 NW 498 (1937).

> The test for an implied contract for compensation is whether such services were performed under circumstances fairly raising a presumption that the parties understood and intended that they should be paid for, or at least that reasonable men in like situation as those who received and are benefited by the service naturally would and ought to understand and expect compensation was to be paid. *Spence v Sturgis Steel Go-Cart Co*, 217 Mich 147, 153; 186 NW 393 (1922).

This test is an issue of fact to be resolved by considering all of the evidence, including the type of services rendered, the duration of the services, the closeness of the parties' relationship and the parties' expressed expectation. *In re Lewis Estate,* 168 Mich App 70, 75; 423 NW2d 600 (1988). It has been held that the acceptance of beneficial

services raises an implied contract. *Donovan v Halsey Fire-Engine Co*, 58 Mich 38; 24 NW 819 (1885). Previous payment by defendant for the same or similar services is evidence to support the contention that one who performed services for defendant is entitled to recover payment for them. *Strong v Saunders,* 15 Mich 339, 1867 WL 3324 (1867).

See also, State Bank of Standish v Curry, 442 Mich 76, 86; 500 NW2d 104 (1993) holding that both language and conduct are to be understood in the light of the circumstances, including course of performance and course of dealing; and *Rood v General Dynamics Corp*, 444 Mich 107; 507 NW2d 591 (1993) stating that intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance. *Id.* at 118 n 17.

> The acceptance of beneficial services raised an implied contract. Although there is no express contract, a contract may be implied in fact where one engages or accepts beneficial services of another for which compensation is customarily made and naturally anticipated, the law implying an understanding or intent to pay the value of the services rendered. 5A Michigan Civil Jurisprudence, Contracts, § 283, p. 382 (footnotes omitted).

It is also Horn Book law that:

> ***Where an agreement involved repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.*** (Emphasis ours.) Restatements Contracts, Second § 202(4).[1]

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[1] Please remember that Boschler's lame and unsupported statement, that he told Barton he would not pay commissions on the subject sales, is soundly and unequivocally rebuffed by Barton's testimony and the barrage of documents admittedly submitted to and known by Boschler that display QPAC's acknowledged involvement and claiming of commissions. This dispute creates a question of fact.

Notwithstanding our well settled jurisprudence, Defendant asserts that its "mere silence" was insufficient to establish the requisite consent needed to modify the contract, waive the written modification provision or establish an implied in fact or law contract.

Defendant's argument is wrong for a number of reasons, not the least of which is that our law also provides that under circumstances that impose a duty to speak or act, silence and inaction can give rise to a contract implied by operation of law. *City of Auburn v Brown,* 60 Mich App 258; 230 NW2d 385 (1975). In such instances, a defendant is estopped from asserting its "inactions" as a defense against plaintiff's claim.

> ***It is a familiar rule of law that an estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out,*** intentionally or through culpable negligence ***induces another to believe certain facts to exist and*** such other ***rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.*** (Emphasis ours.) *Kole v Lampen*, 191 Mich 156, 157-58; 157 NW 392 (1916).

Estoppel is a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact. *Lakeside Oakland Development, LC v H & J Beef Co,* 249 Mich App 517, 527; 644 NW2d 765 (2002); *Conagra, Inc. v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). "It is well established that an estoppel arises from silence as well as from statements, when there is a duty and opportunity to speak." *Inglis v Millersburg Driving Ass'n*, 169 Mich 311, 317; 136 NW 443 (1912).

One is estopped from claiming a construction of a contract that differs from that which he/she led the other party into believing was correct. *Manley v Saunders,* 27 Mich 347; 1873 WL 5886 (1873). ***An estoppel by silence exists when a party knowingly***

permits the opposite party to act to its own disadvantage. (Emphasis ours.) *Bentley v* Cam, 362 Mich 78, 83; 106 NW2d 528 (1960) ***Hence, "[i]f one maintain[s] silence when in conscience he out to speak, the equity of the law will debar him from speaking when in conscience he ought to remain silent."*** (Emphasis ours.) *Detroit Hilton Ltd Partnership v Dep't of Treasury,* 422 Mich 422, 430-431, 373 NW2d 586 (1985) quoting *Michigan Paneling Machine & Mfg Co v Parsell*, 38 Mich 475, 480 (1878).

In *City of Auburn Hills, supra,* the Court held that a question of fact arose as to an implied in fact contract:

> ***The test of an implied contract is whether*** "services were performed under circumstances fairly raising a presumption that the parties understood and intended that they should be paid for, or at least, that ***reasonable men in like situation as those who received and are benefited by the service naturally would and ought to understand and expect compensation was to be paid.***" *Daniels v Goodwin Pontiac Co*, 348 Mich 121, 127; 82 NW2d 444 (1957), quoting from *Spence v Sturgis Steel Go-Cart Co*, 217 Mich 147, 153; 186 NW 393 (1921). Further, it has been stated that: ***'In general contract law, under circumstances which impose a duty to speak or act, the silence and inaction of an offeree can give rise to a contract by operation of law.***" *Wadsworth v New York Life Insurance Co*, 349 Mich 240, 255; 84 NW2d 513 (1957). Under the evidence presented in this case, ***a question of fact arose as to whether or not the defendants' silent acquiescence...***in view of [the] circumstances...***fairly raised the presumption that the parties understood that payment would be made. This question was properly submitted to the jury.*** (Emphasis ours.) *City of Auburn Hills, supra* at 266-67.

Uncontroverted evidence established that Defendant's Bochsler had discussions with QPAC's Barton regarding the Giddings & Lewis 3.3 and 3.9 machines and the 2.7L Ex-Cell-O connecting rod. (150a – 154a.) It was also undisputed that Bochsler was aware of and familiar with various status reports submitted to him by Plaintiff as early as June 1994, which included status of Plaintiff's efforts relating to projects involving

Giddings & Lewis, Ex-Cell-O and Lamb Technicon, which, according to Defendant, were all turnkey customers and, hence, excluded from the written contract. (151a-152a.) These Quotation/Purchase Order/Status Reports, which Defendant admitted having received or seen, were provided to the trial court, evidence Plaintiff's efforts with regard to this "turnkey" business (156a – 167a), specifically identify in the last column Plaintiff's claim for commissions (156a, 159a and 162a), and were deemed pertinent twice by the Court of Appeals (410a – 418a and 494a-502a.) There also was an abundance of further evidence supporting Defendant's knowledge of Plaintiff's efforts in procuring this business for Defendant (168a - 191a), including purchase orders issued to Defendant from Giddings & Lewis with regard to Defendant's sales of these machines procured by Plaintiff, which state "confirming to Ken Barton" (168a – 189a) and Plaintiff's memo to Defendants dated July 18, 1994 requesting commission reports on various machines, including the 3.3 and 3.9 machines.[2] (190a.) There is also Mr. Barton's affidavit. (307a-309a, ¶¶ 3-6.)

Defendant, however, contends that it told Plaintiff that Plaintiff would not receive commissions on this business. (304a-305a.) This argument is feeble and refuted by Mr. Barton's affidavit (307a-309a) and the glaring absence of even one writing admonishing Plaintiff from pursing this business in question or advising Plaintiff that no commission would be paid. Barton also swore that not only had Defendant not inform him that he would not be paid commissions on this business, but Defendant had encouraged Plaintiff's efforts to procure business. (307a – 309a.)

[2] Is it not apparent that although QPAC submitted writings claiming commission on these products and Nagel's complete failure to write anything to QPAC saying that it is entitled to no commissions smacks of deviousness to put it gently?

Why would Plaintiff expend its resources chasing business knowing no reward was coming? It is illogical to conclude that Defendant, who since 1990 had customarily and previously remunerated Plaintiff for such similar efforts (32a and 58a-61a) did not anticipate the obligation to remunerate Plaintiff for its efforts with regard to this business. Why would Defendant not put its position in writing if it really unequivocally asserted that Plaintiff was not entitled to commissions on this business? Lastly, it is illogical to conclude that Defendant's acceptance of Plaintiff's beneficial services did not, at the very least, raise a question of fact as to the presumption of modification, waiver and/or implied contract. Defendant's position just does not fly.

Based on the conflicting affidavits, deposition testimony and the written documents, the trial court was required to recognize that there was a genuine issue of fact to be viewed in the light most favorable to Plaintiff. "The trial court must carefully avoid substituting a trial by affidavit and deposition for a trial by jury. Moreover, the Court is not allowed to make findings of fact or to weigh to the credibility of affiants or deponents. *Durant v Stahlin,* 375 Mich 628; 135 NW2d 392 (1965)." *Soderberg v Detroit Bank & Trust Co*, 126 Mich App 474, 479; 337 NW2d 364 (1983).

Contrary to Defendant's claim, its inactions, in the face of the fact scenario, amounted to more than "mere" silence. As such, its reliance on *In re Kaiser,* 357 Mich 103, 97 NW2d 710 (1959) and *In re Spenger's Estate*, 341 Mich 491; 67 NW2d 730 (1954) for the proposition that an implied contract cannot be based on the "mere" fact that services were rendered is without merit. Much more evidence than mere services has been presented and, unlike the instant case, both *Kaiser* and *Spenger* involved plaintiffs' claims against decedents' estates with regard to personal services rendered to

decedents upon an expectation of a legacy. Here, the parties were not on personal "friendly" terms and Plaintiff did not gratuitously volunteer its services. Rather, they were both business entities transacting business in a commercial setting where payment for services rendered was customarily made and naturally intended.

Likewise, Defendant's reference to *Roberts v Mecosta County Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002) and *Moore v First Security Casualty Co*, 224 Mich App 370; 568 NW2d 841 (1997) for the principal that mere silence is insufficient to establish waiver is totally without merit. *Roberts, supra,* involved this Court's statutory construction of MCL § 600.5856(d), which tolls the 2-year statute of limitations of a medical malpractice action if notice of intent is given in compliance with MCL § 600.2912b. In constructing the statutory intent of the Legislature, this Court determined (1) that the statute is tolled only if notice of intent is given in compliance with all provisions of MCL § 600.2912b; (2) that plaintiff has the burden of complying with the notice requirements of MCL § 600.2912b; and (3) that defendant did not have a duty to challenge any deficiencies in the notice prior to plaintiff's filing of the complaint. Hence, defendant did not waive its right to subsequently challenge the deficiencies of the notice by failing to object prior to Plaintiff's filing of the complaint. This case involved the statutory construction of a statute and not the course of conduct in a commercial setting by business entities.

Moore, supra, cited by Nagel, is also inapplicable and fact specific involving a provision in an insurance policy that excluded coverage of claims settled without the defendant's insurer's consent. In *Moore,* plaintiff sent the insurer a letter informing it of a settlement, enclosed the releases and notified defendant that unless notice was received

within five days plaintiff would assume there was no objection to the settlement. The issue was whether defendant consented to the settlement by failing to respond by this allotted time. The Court of Appeals held that defendant did not waive its right to consent to the settlement because the 5-day period, ending on Memorial Day, was unreasonable.

In so holding, it noted that an insurer might waive its right to insist upon forfeiture for breach of a policy provision by virtue of having induced the insured, by silence, to believe that no objection will be made if the insurer fails to object within a reasonable time after the notice. It, however, was unreasonable under those facts to assume that the insurer had waived its right to approve of the settlement.

In the case at bar, Defendant had been aware of Plaintiff's efforts for at least 8 months but remained silent until after it benefited form the business placed and procured by Plaintiff.

Hence, the facts establish that Defendant's inactions constituted more than "mere" silence. They constituted encouragement. For Defendant to now claim that its mere silence was insufficient to establish the requisite consent to a modification, waiver and implied contract ignores our state's well established jurisprudence. In essence, Defendant is asking this Court to condone detrimental and misleading business tactics, which would, in effect, establish an inequitable and unjust precedent to our state's jurisprudence.

CONCLUSION

Our law clearly provides that a modification, waiver and implied in fact or law contract can be established, not only by express words, but by acts, conduct and other circumstances that impose a duty to speak out or act. In such latter instances, one is

estopped from using his/her silence as a defense. Our law also provides that a question of fact arises as to whether a defendant's silent acquiescence in the face of certain circumstances, which are obviously present here, can raise the presumption that the parties understood payment would be made.

Here, however, a finder of fact never had a chance to determine the issues. Rather, the trial court granted Defendant's motion for summary disposition; in essence conducting an impermissible trial by affidavit/deposition. In doing so, it ignored the plethora of pertinent evidence that established, or at least raised, the issue of whether it was reasonable to conclude that the parties understood that remuneration for Plaintiff's services would be made, anticipated or reasonably expected.

RELIEF

For the reasons and on the basis of the law above stated, Plaintiff prays that this Court:

A. Remand this case to the trial court for trial on the basis of waiver, estoppel and contract implied in fact or law; and

B. Grant Plaintiff such other and further relief as it deems appropriate.

Respectfully submitted,

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